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No. 98-551

In the Supreme Court of the United States

OCTOBER TERM, 1998

TRIPLE A FIRE PROTECTION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
ROAD SPRINKLER FITTERS LOCAL UNION 669,
AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner failed to rebut the Union's presumption of majority status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 136 F.3d 727. The supplemental decision and order of the National Labor Relations Board (Pet. App. B1-B4) and the supplemental decision and order of the administrative law judge (ALJ) on remand (Pet. App. B4-B61) are reported at 315 N.L.R.B. 409. The initial decision and order of the Board remanding the case to the ALJ (Pet. App. C1-C6) and the initial decision and order of the ALJ (Pet. App. C6-C35) are reported at 312 N.L.R.B. 1088.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. A petition for rehearing was denied on July 1, 1998 (Pet. App. D1). The petition for a writ of certiorari was filed on September 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner is a corporation engaged in the installation and maintenance of sprinkler and fire protection systems in Mobile, Alabama. Pet. App. A2. Since petitioner was created in 1983, its employees have been represented by respondent Road Sprinkler Fitters Local Union 669 (Union). *Ibid.* In 1983, petitioner had "signed an agreement to be bound by the 1982-85 national agreement between the [U]nion and the National Fire Sprinkler Association, a multi-employer collective bargaining unit." *Id.* at A3. Again, in 1984, petitioner signed an agreement with the Union to be bound by the 1985-1988 national agreement. *Ibid.*

In October 1987, at the Union's request, petitioner executed a document confirming, "on the basis of objective and reliable information," that "a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, [the Union] for purposes of collective bargaining" and "unconditionally acknowledg[ing] and confirm[ing] that [the Union] is [their] exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act" (NLRA). Pet. App. A6-A7.[1] Thereafter, petitioner signed another agreement

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[1] The Union's request for petitioner's confirmation of the Union's majority status was prompted by the uncertainty created by the 1987 decision of the National Labor Relations Board in *John*

with the Union to be bound by a third national agreement from April 1, 1988, to March 31, 1991. That agreement contained a clause recognizing the Union as the sole and exclusive bargaining representative of petitioner's employees pursuant to Section 9(a) of the NLRA. *Id.* at A7 & n.5.

b. In December 1990, the Union wrote to petitioner proposing the negotiation of another agreement to become effective April 1, 1991, upon expiration of the current agreement. Petitioner did not respond but, early in the spring of 1991, petitioner's president approached various employees on numerous occasions to discuss their status if the company went nonunion. Pet. App. A7-A8. The parties exchanged correspondence about a possible strike and, on March 26, petitioner notified the Union that it "hereby terminates" the agreement "effective[] immediately or as soon as per-

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Deklewa & Sons, 282 N.L.R.B. 1375 (1987), enforced, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988). That decision concerned prehire agreements which employers are specifically authorized to make with unions in the construction and building industries under Section 8(f) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(f), before the majority status of a union is established, because there is a need for such employers to know their labor costs before hiring employees. Pet. App. A3 n.1. The national agreements with which petitioner had agreed to comply were prehire agreements and, in *Deklewa*, the Board ruled that unions would not enjoy a presumption of majority status upon expiration of such agreements. Under *Deklewa*, it became more difficult for unions operating under Section 8(f) prehire agreements to convert their status to full status under Section 9(a) of the NLRA, 29 U.S.C. 159(a), which is what entitles a union to a presumption of majority support upon expiration of a collective bargaining agreement and requires the parties to maintain terms of the expired agreement while bargaining for a new contract. Pet. App. A3-A6 & nn. 1-2.

mitted by applicable law." *Id.* at C20-C21. After further contacts by the Union about negotiating a new agreement, petitioner eventually responded by sending the Union a proposed contract and the parties agreed to begin negotiations on April 9, 1991. *Id.* at A9-A10. When petitioner and the Union met on April 9, they began negotiations for an independent agreement, tentatively approved a limited number of provisions, and agreed to meet again on April 30. *Id.* at A10-A11.

Before the scheduled April 30 meeting, however, petitioner informed the Union, by letter dated April 12, that petitioner would unilaterally implement its contract proposals if no agreement were reached before April 22. Pet. App. A11, B27. On April 22, petitioner unilaterally implemented employment terms that differed from those contained in the expired agreement, including ceasing to make payments to the health, welfare, and pension funds, and hiring employees at wage rates different from those specified in the expired agreement. *Id.* at A11. When the Union and petitioner met on April 30, the Union objected to petitioner's implementation of terms inconsistent with the expired contract, noting that the Union and petitioner had a Section 9(a) relationship requiring petitioner to bargain with the Union until the adoption of a new agreement or impasse, and asserting that petitioner's unilateral actions therefore constituted an unfair labor practice. *Id.* at A12.

2. a. On September 27, 1991, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner alleging, *inter alia*, that petitioner had committed an unfair labor practice in violation of Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5), by unilaterally altering the

employees' wage rates and ceasing to make fringe benefit contributions. Pet. App. A12, C8.

The administrative law judge (ALJ) dismissed the complaint. Pet. App. C6-C35. The ALJ determined that the contract was not a collective bargaining agreement under Section 9(a) of the NLRA, 29 U.S.C. 159(a), but only a "prehire" agreement under Section 8(f), 29 U.S.C. 158(f). Pet. App. C26; see note 1, *supra*. Thus, unlike in a case involving a Section 9(a) agreement, which requires that an employer maintain the status quo on mandatory subjects of bargaining until the parties either agree on a new contract or reach a good faith impasse in negotiations, petitioner's conduct did not constitute an unfair labor practice here because unilateral repudiation of a Section 8(f) prehire agreement is permitted. The ALJ found that petitioner had unilaterally repudiated the Section 8(f) agreement in its March 26, 1991, letter terminating the agreement as of March 31, 1991. *Id.* at C27. In light of that conclusion, the ALJ did not ultimately rule on petitioner's other claims. *Ibid.*

b. The Board reversed. Pet. App. C1-C6. It concluded that the ALJ had erred in rejecting the contention by the General Counsel and the Union that the Union had attained the status of a Section 9(a) representative. *Id.* at C4. The Board emphasized that the Union had "made an unequivocal demand for recognition as the 9(a) representative," had proffered documentary evidence supporting its claim of majority status and, in response, petitioner had "voluntarily and unequivocally granted recognition to the Union as [the Section] 9(a) representative" when it executed the acknowledgment in October 1987, confirming that "a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, [the

Union] for purposes of collective bargaining." *Id.* at C3-C4. The Board found that it was "clear" that "the parties intended to establish a bargaining relationship under Section 9(a) of the Act." *Id.* at C4.

The Board declined petitioner's invitation, at such a "late date," to "inquire into the Union's showing of majority status." The Board explained that, "[i]n non-construction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition," and parties in the construction industry are entitled to the same protection. Pet. App. C4-C5. Here, where petitioner voluntarily recognized the Union as a Section 9(a) representative in 1987 and waited until four years later to object, the Board would not now entertain a challenge to the majority status. *Id.* at C5. The Board remanded the case to the ALJ for resolution of the complaint allegations, including whether petitioner may have been entitled to implement the challenged changes in wages and benefits because of impasse or other reasons. *Id.* at C6.

c. On remand, the ALJ found, *inter alia*, that petitioner violated Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1), by unilaterally changing the employees' wages and benefits on April 22, 1991. Pet. App. B4-B61.[2] The ALJ found no merit to petitioner's affirmative defenses (*e.g.*, that the Union bargained in

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[2] The ALJ also found that, as alleged, petitioner violated Section 8(a)(5) and (1) of the NLRA when "it bypassed the Union and dealt directly with bargaining unit employees." Pet. App. B23. The Board affirmed that ruling and the court of appeals enforced the Board's order concerning those violations. *Id.* at A16. Petitioner does not seek this Court's review of any issues concerning those violations.

bad faith, that an economic emergency justified petitioner's actions) and found that there was no bargaining impasse prior to or after the unilateral changes were implemented on April 22. *Id.* at B4, B33-B55. The ALJ did not address petitioner's renewed argument that "the Union never represented an uncoerced majority of its employees," because the Board had found that the Union enjoys a Section 9(a) relationship with petitioner, that the contract at issue was effective under Section 9(a), and that, therefore, the claim was barred by the six-month limitations period of Section 10(b) of the NLRA, 29 U.S.C. 160(b). Pet. App. B9, B33-B34.[3] The ALJ ordered petitioner, *inter alia*, to cease its unlawful conduct, to make whole all bargaining unit employees and benefit funds, and to rescind, on the Union's request, any of its unilateral changes. *Id.* at B4, B56-B60.

d. The Board affirmed the ALJ's rulings, the ALJ's findings (as modified in respects not relevant here), and his conclusions of law. Pet. App. B1-B3. The Board adopted the ALJ's recommended order. *Id.* at B3.

3. The court of appeals enforced the Board's order. Pet. App. A1-A27. The court agreed with the Board that the relationship between petitioner and the Union had been converted to full Section 9(a) status by virtue of petitioner's October 1987 voluntary recognition of the Union's majority status and the supporting evidence of that fact, and the court noted that petitioner did not contend otherwise. *Id.* at A14-A15 & n.12. Thus, the Union "was entitled to a presumption of

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[3] Section 10(b) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b).

majority support upon the expiration of the collective bargaining agreement at the end of March 1991." *Id.* at A15. Petitioner therefore "had a duty not to * * * make unilateral changes in violation of section 8(a)(5)." *Id.* at A16.

The court found substantial evidence to support the Board's findings that petitioner violated Section 8(a)(5) and (1) by unilaterally altering the employees' wages and benefits. Pet. App. A17-A18. The court rejected petitioner's defense that the union majority that existed at the time of petitioner's voluntary recognition was a coerced majority because of allegedly discriminatory provisions in the collective bargaining agreements the parties had signed. *Id.* at A18-A21. The court ruled that the Board reasonably interpreted the six-month time bar of Section 10(b) of the NLRA to foreclose that defense because "[i]t has long been recognized that section 10(b) prohibits employers from waiting more than six months to attack the majority status of union representation at the time of recognition." *Id.* at A19 (citing *Local Lodge No. 1424, IAM* v. *NLRB* (*Bryan Manufacturing*), 362 U.S. 411 (1960)). The court noted that, where such a time bar exists, employers have available other remedies such as establishing the foundation for withdrawing recognition from the Union, but petitioner did not make such arguments. Pet. App. A21 n.15. The court also found substantial evidence to support the Board's findings that petitioner failed to demonstrate that the parties had reached an impasse in bargaining at the time of the unilateral changes, *id.* at A22-A23, or that the Union had negotiated in bad faith, *id.* at A23-A24 n.18. And the court also rejected petitioner's arguments regarding waiver and economic necessity. *Id.* at A25-A26.

ARGUMENT

The court of appeals reasonably concluded that petitioner failed to rebut the Union's presumption of majority status. Petitioner's challenge (Pet. 9) to the standard applied by the court of appeals, and its claim (Pet. 13) of a purported conflict amongst the courts of appeals regarding the presumption of majority status upon expiration of a collective bargaining agreement, are without merit and do not warrant further review.

1. a. Petitioner contends (Pet. 9, 11) that the court of appeals failed to apply the correct standard for determining whether a presumption of majority status is warranted upon expiration of a Section 9(a) agreement, thereby rendering the court of appeals' ruling inconsistent with *Local Lodge No. 1424, IAM* v. *NLRB* (*Bryan Manufacturing*), 362 U.S. 411 (1960). In *Bryan Manufacturing*, the Court held that, where "a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint," the policies underlying the Section 10(b) limitations period preclude converting "what is otherwise legal into something illegal." *Id.* at 419. Accordingly, the Court held that a contract, lawful on its face, could not be found to be unlawful because it was entered into with a minority union, where the charge of illegality was filed more than six months after the contract was executed. *Id.* at 417-419. In order to fully effectuate the policies underlying Section 10(b), the Board and the courts have likewise applied that time bar to the assertion of stale unfair practice claims raised by em-

ployers and unions as defenses to other charges.[4] The court of appeals correctly applied those principles to rule that the Board reasonably concluded that petitioner's attack on the majority status of the Union at the time of petitioner's October 1987 voluntary recognition was time-barred because petitioner waited nearly four years after that event to raise its claim. Pet. App. A19-A20.

Petitioner apparently attempts (see Pet. 12) to avoid the time bar by asserting that it should not apply here because "illegal activity occurred within six months of the filing of the charge." Petitioner points to the Court's acknowledgment in *Bryan Manufacturing* that, "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices * * * earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." 362 U.S. at 416 (quoted at Pet. 12). Petitioner does not, however, demonstrate that that principle is applicable to this case, and neither the Board nor the court below understood it to be so, as petitioner appears to acknowledge. See Pet. 9. Petitioner did not seek to "shed light" on any matters that occurred within the six-month period preceding its unilateral implementation of new employment terms in April 1991. Rather, as the court of appeals explained (Pet. App. A18), petitioner sought to justify its conduct by

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[4] See, *e.g.*, *NLRB* v. *Viola Industries-Elevator Div., Inc.*, 979 F.2d 1384, 1387 (10th Cir. 1996) (barring employer's claim that union coerced it into signing Section 8(f) agreement as defense to charge of unlawful repudiation of agreement); *NLRB* v. *District 30, UMW*, 422 F.2d 115, 120 (6th Cir. 1969) (barring union's challenge to employer's recognition of rival union as defense to charge of unlawful picketing), cert. denied, 398 U.S. 959 (1970).

showing that, when it granted the Union voluntary recognition in October 1987 (a point in time far outside the six-month period), the Union did not enjoy the support of an uncoerced majority of its employees because membership in the Union was coerced in 1987 by allegedly discriminatory provisions in the agreement. Thus, petitioner attempted to "cloak with illegality" an event that occurred outside the limitations period and which could not, therefore, have been made the subject of an unfair labor practice complaint. 362 U.S. at 417. Accordingly, the court of appeals correctly upheld the Board's conclusion that petitioner's claim was time-barred.

b. To the extent that petitioner may now be contending (see Pet. 10-11) that provisions in the agreement in effect in 1991 constituted illegal activity because they facially discriminate in favor of Union members, that contention is based on a bare, unsubstantiated assertion that the objected-to contractual provisions are facially unlawful. There is no merit to that assertion.

For example, petitioner suggests (Pet. 10) that a provision in the national agreements discriminates against persons who are not Union members because it provides that "[a] person not a member of the [Union] shall be acceptable for employment as a Journeyman only after he has produced for the Employer sworn affidavits of six (6) years' experience in the Sprinkler Industry as a Helper, Apprentice and/or Journeyman on the letterhead of his previous Employer or Employers." See Pet. App. H1. Petitioner claims that the provision is discriminatory because many workers may not be able to obtain such affidavits and the requirement applies only to non-members. Section 8(f)(4) of the NLRA, however, permits unions and employers in

the construction industry to enter into a labor contract that "specifies minimum * * * experience qualifications for employment." 29 U.S.C. 158(f)(4); see, *e.g.*, *Local No. 42, Int'l Ass'n of Heat & Frost Insulators*, 164 N.L.R.B. 916 (1967). The national agreement's experience requirement "conforms to the period of Apprentice training as set forth in the Apprentice Standards of the Sprinkler Industry." Pet. App. H1. Moreover, it is inaccurate to imply that only nonmembers are subject to an affidavit requirement—under the constitution of the United Association, applicants for membership in a local union must likewise provide "an affidavit or affidavits from a recognized employer or employers vouching for the applicant's ability to adequately perform the work of his trade and also vouching for his character," which must demonstrate "actual practical working experience" in the trade. See Constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, § 158 (1981), *reprinted at* 2 C.A. R.E., Tab P16, at 7.

Petitioner also suggests (Pet. 10-11) that the agreement between petitioner and the Union impermissibly strengthens the Union's control over apprentices because it requires that apprentices abide by the working rules and regulations of the Union. But, again, Section 8(f)(4) of the NLRA permits unions and employers in the construction industry to enter into a labor contract that "specifies minimum training * * * qualifications for employment." 29 U.S.C. 158(f)(4). And, contrary to petitioner's suggestion, *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954), does not support its argument that the objected-to provision is facially unlawful. That case did not deal with apprenticeship rules; rather, the Court there concluded (in agreement with the

Board) that the union had unlawfully sought to encourage an employee to abide by a union membership rule respecting prompt payment of dues in the absence of a union-security clause requiring such payment. See *id.* at 24-27, 42.

Finally, petitioner objects (Pet. 10; see also Pet. 5-6) to the Union's "Scholarship Loan Agreement" under which an individual who completes the five-year apprenticeship program financed by the Union's education fund, is not charged for the cost of training (approximately $6,000) if, upon attaining journeyman status, he or she works for an employer under the terms of a collective bargaining agreement that "provides for the payment of contributions by such Employer to the [Union Education] Fund or a like Joint Apprenticeship or Training Fund." Pet. App. J5-J7. Such a worker receives a credit for each year of such employment and has the repayment amount due reduced in accordance with a repayment schedule. *Id.* at J6, J9. But that provision is not part of the agreement between petitioner and the Union at issue here. In any event, although petitioner asserts (Pet. 10) that that agreement penalizes individuals who elect to work for non-union employers, one court has rejected the contention that such an agreement is "illegal as being against public policy," concluding instead that "[t]he reimbursement prevents freeloading by neighboring competitors." *National Training Fund* v. *Maddux*, 751 F.Supp. 120, 121 (S.D. Tex. 1990). And the authority cited by petitioner, *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986), does not support its apparent claim that such an agreement is per se unlawful. Rather, in that case, the court struck down as invalid a pension plan amendment under the Employee Retire-

ment Income Security Act of 1974 relating to delayed payment of benefits in certain circumstances if an employee accepted employment with a nonparticipating employer, based on its finding that the plan "failed to substantiate its claim of financial necessity" for the plan amendment. *Id.* at 1038-1039.

2. Petitioner contends (Pet. 13) that the court of appeals' decision is in conflict with decisions of other courts "on the important issue of the presumption of majority status upon the expiration of a collective bargaining agreement." Petitioner appears to base that contention on its claim that, at the time of its unilateral implementation of new wages and benefits in April 1991, it had a reasonable basis to doubt the existence of an uncoerced majority, and on the fact that courts have held that, in adjudicating such a claim, it is proper to "consider pre-[Section] 10(b) evidence relating to the original recognition of a union under Section 9(a) of the Act." See Pet. 13-16 (citing cases).

There is no merit to petitioner's contention because the Union, having achieved "full section 9(a) status" by virtue of petitioner's extension of voluntary recognition in October 1987, was "entitled to a presumption of majority support upon the expiration of the collective bargaining agreement at the end of March 1991." Pet. App. A15; see, *e.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 786 (1996) (upon expiration of contract, union has rebuttable presumption of majority status). It is correct that an employer may overcome that presumption "by showing that, at the time of the refusal to bargain * * * the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); see also *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 118 S. Ct. 818, 823

(1998). The court of appeals recognized that such a course of action is generally available to an employer, but expressly noted that "[i]n the instant case, [petitioner] makes no such argument." Pet. App. A21 n.15. Rather, petitioner sought to justify its action on the ground that "the union majority which existed at the time of the October 1987 voluntary recognition was a coerced majority." *Id.* at A18. The court of appeals correctly concluded that that claim was time-barred by Section 10(b) of the NLRA. See pp. 9-10, *supra*.

In any event, the cases relied upon by petitioner (Pet. 14-16) are not in conflict with the decision below. In *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973), the court concluded that an employer who refused to bargain with the union for a new contract on the basis of an alleged good-faith doubt as to the union's majority status, was not barred by Section 10(b) from supporting that claim with evidence, arising outside of the limitations period, which the employer alleged had been fraudulently concealed by the union. See *id.* at 332-335. There was no allegation of fraudulent concealment here. In *Pick-Mt. Laurel Corp.* v. *NLRB*, 625 F.2d 476 (3d Cir. 1980), the court concluded, as did the court below, that, "[w]hen there has been no change in the employer," application of Section 10(b) to bar the employer from challenging the union's majority status more than six months after voluntarily recognizing it "clearly carries out the congressional policy of protecting existing relationships." *Id.* at 484. Although the court also concluded that "[t]hat policy cannot be fully served," and, accordingly, that Section 10(b) does not operate as such a bar, "where there is a successor employer, who never had an existing relationship with the [u]nion" (*ibid.*), the court below had no occasion to

address that issue, as this case does not involve a successor employer.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1998

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[5] Petitioner also cites (Pet. 15) *NLRB* v. *Local No. 2, United Association of the Plumbing and Pipefitting Industry*, 360 F.2d 428 (2d Cir. 1966), but that case did not involve the application of Section 10(b) to an employer's claim that the union did not represent an uncoerced majority of the employees at the time the employer extended it voluntary recognition. Rather, in *Local No. 2*, the court, in agreement with the Board, concluded that a provision of the union-security clause at issue was "clearly invalid" because its "plainest meaning" was that "any [u]nion man is to be hired in preference to any non-union man." *Id.* at 435. Petitioner does not allege that the 1988-1991 national agreement contained such a provision.